No. 93-2068

Supreme Court, U.S.
FILED
MAR 27 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRETT C. KIMBERLIN,
Petitioner,

v.

J. MICHAEL QUINLAN and
LOYE W. MILLER, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether plaintiffs in *Bivens* cases in which unlawful motive is an element of the alleged offense must satisfy a "heightened pleading standard" to survive a motion to dismiss or for summary judgment based on an assertion of qualified immunity?

2. Whether plaintiffs in *Bivens* cases must produce, prior to discovery, "direct" as opposed to persuasive circumstantial, evidence of unlawful motive?

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 6 F.3d 789. The order and opinions denying petitioner's suggestion for rehearing and for rehearing *en banc* (Pet. App. 64a-75a) are reported at 17 F.3d 1525. The opinion of the district court (Pet. App. 44a-63a) is reported at 774 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. Pet. App. 79a. A petition for rehearing was denied on April 1, 1994 (Pet. App. 64a-75a). The petition for a writ of certiorari was filed on June 22, 1994 and granted on January 20, 1995. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988).

STATEMENT

1. Petitioner Brett C. Kimberlin is a former federal inmate who at the time of the events at issue in this case was serving a 51-year sentence for various explosives violations, including malicious use of explosives to injure a person, conspiracy to smuggle marijuana, impersonating a federal officer and the illegal use of the Presidential seal and Department of Defense insignia. C.A. App. 93; Pet. App. 3a & n.3, 44a & n.1. He is also a convicted perjurer. C.A. App. 93.[1] In this *Bivens*[2] action Kimberlin seeks damages from respondents, J. Michael Quinlan, the former Director of the Bureau of Prisons ("Bureau"), and Loye W. Miller, Jr., the former Director of Public Affairs for the United States Department of Justice. He alleges, *inter alia*, that Quinlan and Miller conspired to violate his First Amendment rights when they allegedly caused him to be placed in administrative detention because of the content of his speech.

In late 1988, while imprisoned at the Federal Correctional Institution at El Reno, Oklahoma, petitioner stated that he "believed" he had sold marijuana to Dan Quayle on several occasions in 1972. C.A. App. 12; App. A3. When petitioner made that allegation, Quayle was a United States Senator and a candidate for Vice-President of the United States. Approximately two weeks prior to the November 8, 1988 presidential election, petitioner provided Nina Totenberg, a correspondent for National Public Radio, with both a taped telephone interview and a written affidavit containing his allegations about having

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[1] *See e.g., United States* v. *Kimberlin*, 805 F.2d 210, 215-16 (7th Cir.), *cert. denied*, 483 U.S. 1023 (1987); *United States* v. *Kimberlin*, 781 F.2d 1247, 1248-49 (7th Cir. 1985), *cert. denied*, 479 U.S. 938 (1986); *United States* v. *Kimberlin*, 483 F. Supp. 350, 351 (S.D. Ind. 1979); *Kimberlin* v. *DeLong*, 637 N.E.2d 121, 123-24 (Ind. 1994).

[2] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

sold marijuana to Quayle. Totenberg did not report the story because she could not corroborate it. C.A. App. 79.

Petitioner, who was in active telephone contact with several national news reporters, C.A. App. 92, then offered the story to NBC News, which requested permission from El Reno officials to interview and videotape petitioner one week prior to the election. Although the NBC request was made too late under normal El Reno logistical procedures to allow the interview to be conducted prior to the election, Quinlan, at NBC's behest, personally intervened and directed El Reno to accommodate NBC and permit the interview. C.A. App. 92; Pet. App. 3a. As a result, NBC videotaped a lengthy interview of Kimberlin four days before the election, that it decided not to air. C.A. App. 67, 92, 94, 106-07.[3]

The NBC videotaping generated other press interest in the petitioner and resulted in other news organizations seeking immediate access to him. C.A. App. 67. To accommodate the numerous press inquiries, the El Reno acting-warden scheduled a "press conference" for petitioner at 7:00 p.m. *the same evening*. Pet. App. 4a. Upon learning from a reporter of the scheduled press conference, Mark Goodin, Deputy Press Secretary for the Bush/Quayle campaign, telephoned Miller and stated he was "amazed" that the petitioner was going to hold a press conference. Pet. App. 4a. Miller responded, "Well, amazed or not, he's going to have one. It's within his rights to have one according to the rules and regulations." *Id.* Totenberg also telephoned Miller and expressed unhappiness about the press conference, indicating that she had given up her chance to report petitioner's claims exclusively, and that with a press conference, another news organization was not likely to be so responsible. C.A. App. 82. Miller told her he would check into it. *Id.*

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[3] The record is in conflict as to whether the NBC interview lasted forty-five minutes or four hours. Compare C.A. App. 49 with C.A. App. 67, 106.

Sometime that afternoon, the Bureau's Central Office in Washington learned from a wire service inquiry that petitioner was scheduled to hold a "press conference" at the El Reno institution. Because the Bureau's regulations do not permit inmate press conferences, and because he had never permitted them during his tenure as Director, Quinlan ordered the institution to cancel the press conference pursuant to his authority as Director. Pet. App. 4a & n.6; C.A. App. 67, 78, 95.[4] Although Bureau regulations permit individual media contacts by inmates, and small press pools in some circumstances, neither the regulations nor Bureau policy permit inmate "press conferences." C.A. App. 95; Pet. App. 4a & n.6. The regulations also provide that any questions as to their meaning or application "are resolved by the Director of the Bureau of Prisons." 28 C.F.R. § 540.61(g) (1988).[5]

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[4] Historically, the position of Director of the Bureau of Prisons always has been held by a career Bureau professional. In late 1988, Quinlan was a 17-year career civil servant who had risen through the Bureau's ranks and had served as a warden. *See e.g.*, *Weeks* v. *Quinlan*, 838 F.2d 41, 42 (2d Cir. 1988). He therefore possessed not only the regulatory authority, as Director, to cancel the press conference, he also had far more familiarity and experience with Bureau policy and procedures than did the then-acting warden at El Reno. Petitioner's effort to undermine Quinlan by citing to a December 19, 1988 *Legal Times* article in which it was reported that the Bureau's General Counsel allegedly said press conferences had been permitted in the past is wide of the mark. The article is inaccurate and inadmissible hearsay.

[5] *See* 28 C.F.R. §§ 540.61-540.63 (1988) (permitting limited media interviews of inmates); 28 C.F.R. § 540.64 (1988) (permitting small press "pools" with one press member from each major press medium). Petitioner seeks to avoid the fact that "press conferences" are not permitted, and never have been, by using the more soothing term "group interview"—which also is not permitted—to characterize his event. Pet. Br. 10. The prohibition is based on the need to maintain inmate discipline. This Court has recognized that when, as here, the press concentrates its attention on a particular inmate, that interest often leads to the inmate becoming a "public figure" within the prison population and fre-

a. *The November 4 Detention.* That evening, petitioner telephoned Totenberg, "complained bitterly" about the cancellation of his press conference and expressed concern "about what the Justice Department might do to him." C.A. App. 80, 83-84. Totenberg then called Miller who recalls that she said petitioner believed that his "safety was threatened by the hostile attitude of the prison authorities." *Id.* at 84. Subsequently, Miller telephoned his press counterpart at the Bureau and informed him of the Totenberg call, including that petitioner believed "he was in danger." Pet. App. 5a; 53a.

That information was conveyed to Director Quinlan, C.A. App. 95, who gave instructions, not to El Reno authorities, but to J.D. Williams, the Regional Director with oversight of El Reno, "to take appropriate steps to ensure the inmate's safety and to investigate the purported danger." C.A. App. 68. Williams conveyed the information to the acting-warden at El Reno. *Id.* As Quinlan later wrote, "it was clearly understood that this information would result in Kimberlin being placed in administrative detention (a non-punitive, single cell status) pending an assessment of any possible threat to Kimberlin." C.A. App. 95, 107; Pet. App. 5a.[6] At approximately 11:30 p.m. on the evening of Friday, November 4, 1988, petitioner was placed in administrative detention for the purpose of investigating reported threats to his safety. His time in detention totalled approximately twenty hours. Pet. App. 5a; C.A. App. 95; 28 C.F.R. § 541.22.

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quently a disciplinary problem "that can engulf a large portion of the population of a prison." *Saxbe* v. *Washington Post Co.*, 417 U.S. 843, 848-49 (1973); *Pell* v. *Procunier*, 417 U.S. 817, 831-32 (1973). Restrictions such as the prohibition of inmate "press conferences" or "group interviews" are appropriate because the press has no "constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.* at 834.

[6] Applicable regulations provide that BOP officials may place an inmate in administrative detention "when the inmate's continued

Upon hearing from other inmates that petitioner had been placed in non-punitive detention based on a fear that he was in danger, Totenberg telephoned Miller. C.A. App. 80. When she learned during that conversation that she was being quoted as the source for saying petitioner was in danger, Totenberg told Miller it was "untrue" and denied having said "any such thing." *Id.* Nevertheless, Totenberg subsequently admitted that petitioner had expressed concern to her "about what the Justice Department might do to him." *Id.* In addition, Mark Goodin testified that on that same evening Totenberg told him during a telephone conversation that the petitioner "fear[ed] for his safety." C.A. App. 114.

The contemporaneous detention order prepared by the executive assistant to the El Reno acting-warden, indicated that the petitioner was placed in detention based on a telephone call from a radio reporter to Miller. It also noted the independent fact that the evening watch lieutenant at El Reno had received information that inmates were saying that if Kimberlin would "snitch" on Quayle he might do the same to them. C.A. App. 49; Pet. App. 5a. The memorandum concluded that based on the telephone call and the information about being called a "snitch," petitioner was being "placed in administrative detention" in order to insure his safety and "until the matter could be throughly [sic] investigated." *Id.* During his detention, petitioner was permitted to speak with Totenberg by telephone, C.A. App. 68, 80,

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presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate: . . . (5) Requests admission to administrative detention for the inmate's own protection, or staff determines that admission to or continuation in administrative detention is necessary for the inmate's own protection." 28 C.F.R. § 541.22(a) (1988). Among those BOP may consider placing in administrative detention are "[i]nmates about whom staff has good reason to believe the inmate is in serious danger of bodily harm." 28 C.F.R. § 541.23(a)(8) (1988).

95, and made at least seven telephone calls to "news media personnel, family and friends." Pet. App. 14a-15a; C.A. App. 111.

While petitioner was in administrative detention, Goodin again telephoned Miller and "noted the obvious: that the closer to the Tuesday election that the story were to break, the more attention it was likely to get, and the better chance that it would have at least some adverse effect on the Bush/Quayle chances." C.A. App. 85; Pet. App. 5a-6a. According to Miller, Goodin "did not try in any way to influence the department's handling of Kimberlin." C.A. App. 85; Pet. App. 6a. Goodin also "denied seeking or receiving any 'reassurances' from Miller" or "ever speaking with anyone at the Bureau." Pet. App. 6a. Similarly, Director Quinlan "stated that the Bureau received only a single call from the Bush/Quayle campaign regarding Kimberlin" and that call, which only sought information, went not to him but to the Bureau's Office of Public Affairs. *Id.*; C.A. App. 96. No one "from the Bush/Quayle campaign ask[ed] or instruct[ed] the Bureau of Prisons to do anything with regard to this matter." Pet. App. 6a; C.A. App. 96.

At 7:30 p.m. the next day, Saturday, November 5, 1988, more than two full days before the election, the petitioner was released from administrative detention after approximately twenty hours. He returned to the general prison population where he had free access to the telephones and on the following day, Sunday, November 6, was interviewed "on a number of radio talk shows." C.A. App. 81. The petitioner was released from his non-punitive detention after an investigation revealed no threat to his safety and after he stated that he perceived no threat. C.A. App. 68; Pet. App. 6a. That decision was made solely by El Reno officials with no involvement by Director Quinlan. C.A. App. 68. In fact, Quinlan's November 4 action to segregate petitioner from the El Reno general prison population until any

threat could be assessed was the end of his involvement in all matters related to petitioner. The record is similarly devoid of any evidence that Quinlan and Miller ever communicated with each other during the relevant time period.

b. *The November 7 and December 22 Detentions.* Subsequently, the petitioner was placed in administrative detention on November 7, 1988, and again on December 22, 1988, for violating prison telephone regulations. Neither Quinlan nor Miller had any involvement in either detention. Pet. App. 6a-7a, 15a-17a.[7] The regulations permit an inmate, subject to limitations, to use telephones, but not to telephone one party and have that party electronically transfer the call to a third party. 28 C.F.R. § 540.104 (1988). Such "third party calls" are proscribed because they are often used to facilitate illegal activity and to circumvent prison telephone procedures. C.A. App. 78.

Contemporaneous El Reno records reflect that the petitioner was placed in administrative detention on November 7, 1988 because he placed a third-party call to a friend who routed it on to a member of the Dukakis campaign.[8] When confronted with this information, the petitioner first denied but later admitted it to be true. C.A. App. 53, 55-57. Other evidence indicated that peti-

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[7] The district court determined that Director Quinlan "ordered personally" the November 7 detention. Pet. App. 55a. The court's only cited basis for that conclusion—exhibit F to the first amended complaint—is a December 20, 1988 article from the *New York Times* purporting to attribute that information to Miller. The article is, of course, inadmissible hearsay. The court of appeals found insufficient evidence of any involvement by Quinlan or Miller in the November 7 and December 22 detentions, Pet. App. 15a-17a, and noted that such hearsay "cannot defeat a summary judgment motion." *Id.* at 15a-16a, n.15.

[8] According to the Bureau, it is not unusual under ordinary procedures to place an inmate in administrative detention pending a disciplinary hearing. C.A. App. 69.

tioner was attempting to make third-party telephone calls to facilitate a telephone press conference at the Mayflower Hotel in Washington. C.A. App. 68, 96. Following a hearing on November 14, 1988, petitioner was found guilty of the violation, sanctioned by the forfeiture of two days statutory good time, which was later reduced to a warning, C.A. App. 46, and released from detention later that day. C.A. App. 57, 69, 96; Pet. App. 6a.

On December 22, 1988, the petitioner was again charged by El Reno officials with the violation of third-party telephone rules and placed in administrative detention. A hearing was held the following day, petitioner was found not guilty and he was released from detention. C.A. App. 46-47, 60-63, 110. Again, Quinlan and Miller had no involvement in these events.

2. On July 2, 1990, petitioner filed this action in the United States District Court for the District of Columbia against Quinlan, in both his individual and official capacities, Miller, in his individual capacity, and the United States. The complaint asserted *Bivens*-type claims against Quinlan and Miller for alleged violations of the First and Fifth Amendments and various claims against the United States.[9]

The respondents moved for a protective order prohibiting discovery until the district court could resolve their claim to qualified immunity. The district court largely denied the motion and permitted discovery to proceed "except that which relates exclusively to the *Bivens* claims." C.A. App. 3. The district court subsequently denied respondents' motion for reconsideration of that order. *Id.* at 4. Petitioner then embarked on a campaign of wide-ranging discovery that included both document

[9] The complaint asserted claims against the United States were for assault, battery and false imprisonment under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.*, and for violation of Title III of the Organized Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511, arising out of the monitoring of Kimberlin's telephone calls. Pet. App. 44a-64a.

production and the taking of twenty-three depositions ranging from former-Attorney General Thornburgh to El Reno staff personnel. Quinlan, Miller and the petitioner were not deposed.

In August 1991, the district court granted in part and denied in part the respondents' motion to dismiss or for summary judgment. The court dismissed petitioner's Fifth Amendment and assault and battery FTCA claims, but denied the motion as to all remaining claims, including, specifically, the respondents' assertion of an entitlement to qualified immunity. Pet. App. 44a-63a. Only the immunity claims are before this Court. The district court recognized that applicable circuit precedent required plaintiffs asserting *Bivens* claims based upon allegedly unconstitutional motive to meet a heightened pleading standard. The court concluded, however, that petitioner's allegations of unconstitutional motive were "tangible and nonconclusory." Pet. App. 52a.

3. a. Quinlan and Miller noticed an immediate interlocutory appeal. A divided panel of the court of appeals reversed. Judge Henderson, writing for the majority, held that circuit precedent required a plaintiff who alleges a constitutional tort by a government official, in which the outcome hinges on the official's intent or state of mind, to plead and produce "direct evidence" of the improper motive in order to withstand a motion to dismiss or for summary judgment asserting qualified immunity. Pet. App. 8a-12a.

After reviewing the record, Judge Henderson noted with respect to the November 4 detention that "the motive Kimberlin alleges—denying him access to the press—seems particularly unlikely since Kimberlin had already aired his allegations to NBC News and was permitted telephone contact with members of the media and others during his detention." Pet. App. 14a. She also noted with respect to the November 4 detention that because Bureau officials "have an obligation to provide

prisoners with reasonable protection from foreseeable violence . . . Quinlan would have been remiss, and risked liability, had he failed to order detention and Kimberlin subsequently came to harm. Of course, by ordering detention Quinlan also risked (and got) a lawsuit." Pet. App. 14a, n.14.

As for the latter two detentions, Judge Henderson found that the record was "devoid of any direct evidence" that either Quinlan or Miller were involved in those detentions. *Id.* 15a-17a. Judge Henderson concluded by stating:

> Kimberlin relies only on inference and weak circumstantial evidence, notably the timing of events, to support his claim of unconstitutional detention by Quinlan and Miller; he has produced no direct evidence of unconstitutional motive for any of his detentions as required under our heightened pleading standard. Such unsubstantiated claims as Kimberlin raises are precisely the sort that both qualified immunity and our circuit's heightened pleading standard are intended to cut short.

Pet. App. 17a.

Judge Williams concurred but questioned the validity of the direct evidence component of the heightened pleading standard. Pet. App. 17a-19a. Judge Edwards dissented, asserting that he found no basis for a requirement of direct evidence nor of any heightened pleading standard. Pet. App. 20a-21a.

b. The court of appeals denied rehearing and a suggestion for rehearing *en banc*.[10] Judge Williams, in a

[10] Petitioner argues that "more active judges favored rehearing than opposed it." Pet. Br. 17. The record, however, reflects that only four judges voted in favor of rehearing *en banc*, Pet. App. 65a. Nevertheless, on June 23, 1994, the court of appeals denied respondents' request for a correction of Judge Edwards's statement in dissent that five judges voted in favor of *en banc* review and four against. Pet. App. 69a.

statement concurred in by Judges Silberman and Buckley, wrote that the "direct evidence" rule, although imperfect, preserved accountability for constitutional violations based on motive while safeguarding federal officials from the burdens and expense of unwarranted litigation.

> Drawing the line depends, under the Supreme Court's view of the *Bivens* remedy, on the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money.

Pet. App. 66a. Judge Williams concluded that it was "on balance preferable" to keep the direct evidence rule until the Supreme Court resolves the issue. *Id.* at 66a-67a. Judge Silberman also separately concurred. Judge Edwards, joined by Chief Judge Mikva and Judge Wald, reiterated in dissent the points made in his panel dissent. *Id.* at 72a.

SUMMARY OF ARGUMENT

1. In *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this Court formulated a wholly objective test to assess a government official's entitlement to qualified immunity. The test seeks to accommodate a damages remedy under the constitution with minimizing the heavy social costs such litigation necessarily imposes on individually sued government officials. Application of *Harlow's* objective test is problematic, however, when unconstitutional motive is an element of a plaintiff's claim, because the question of motive is wholly subjective. The District of Columbia Circuit addresses the problem by applying a heightened pleading standard, whereby a plaintiff is required to submit direct, as opposed to circumstantial, evdence of improper motive to withstand a dispositive motion asserting entitlement to immunity.

2. The direct evidence standard is impelled by: (i) the expansive language in *Harlow* and its progeny em-

phasizing objectivity; (ii) this Court's admonition that courts determine entitlement to qualified immunity at the earliest possible stage of litigation; and (iii) the need to protect officials from "insubstantial suits." Like other areas of the law where policy concerns limit the types of evidence that can be used or the inferences that can be drawn from such evidence, the substantive policy concerns undergirding immunity justify the direct evidence standard. Although the standard constrains motive-based *Bivens* cases, it gives substance to the promise that qualified immunity is an "immunity from suit." It also has the benefit of being an easily applied and understood bright-line standard.

Petitioner's and amici's criticism of the direct evidence standard is unwarranted. The standard's goal is not, as petitioner and amici would prefer, to maximize opportunities for motive-based *Bivens* cases to be prosecuted successfully. Rather, the greater public policy objective —protecting officials from meritless claims in improper motive cases—justifies the requirement of direct evidence.

3. Heightened pleading standards in *Bivens* cases are not precluded by the Federal Rules of Civil Procedure. Rather, the substantive right of immunity overrides the application of any procedural rule. If the Court determines, however, that direct evidence is not an appropriate standard, the Court should adopt a "clear and convincing evidence" standard similar to the standard applied in libel cases. It should not adopt the formulation proposed by the Solicitor General because that proposal is effectively no heightened pleading standard at all, and it provides no real protection for public officials.

4. Whatever standard the Court applies to motive-based *Bivens* suits, the respondents should be accorded qualified immunity. The conduct of the respondents was both objectively reasonable and not violative of any clearly established law. Despite extensive discovery, in-

cluding twenty-three depositions, petitioner has fallen far short of demonstrating an improper motive.

ARGUMENT

This case underscores the Court's observation made more than four decades ago, which is particularly apt in *Bivens* cases, that "[i]n times of political passion, dishonest or vindictive motives are readily attributed . . . and as readily believed." *Tenney* v. *Brandhove*, 341 U.S. 367, 377-78 (1951). It is also a case that has defied the Court's admonition in *Butz* v. *Economou*, 438 U.S. 478, 507-508 (1978), that "[i]nsubstantial lawsuits" against government officials should be "quickly terminated."

Six and one-half years ago, respondent Quinlan, upon being informed that an acting-warden had scheduled an inmate "press conference," ordered it canceled because inmates possess no constitutional, statutory or regulatory entitlement to press conferences and because inmate press conferences have never been permitted. Upon subsequently being informed later that night of concern for petitioner's safety, Quinlan acted as any responsible Bureau Director would have and instructed the Regional Director to segregate petitioner from the general prison population for his safety and until the extent and nature of any danger could be assessed. Quinlan was *obliged* to take action to protect the petitioner, *Washington* v. *District of Columbia*, 802 F.2d 1478, 1481-82 (D.C. Cir. 1986), and, as Judge Henderson noted, would have been "remiss" had he not ordered detention. C.A. App. 14a, n.14.

Miller's alleged actions are even more innocuous. Because Miller, as the then-Director of Public Affairs for the Department of Justice, simply fielded and relayed telephone calls concerning Kimberlin between members of the press and the Bureau—as his position required—and because he received telephone calls during the relevant time period from Mark Goodin of the Bush/Quayle

campaign, he too has been dragged into the mire of this litigation. Although petitioner alleges that the respondent "participated in and furthered a scheme" to prevent him from speaking with the press, the record contains no evidence that respondents ever spoke with each other, let alone conspired or "schemed."

By any measure, respondents should be accorded qualified immunity from petitioner's suit. The court of appeals held in the respondents' favor by applying the direct evidence component of its heightened pleading standard.[11] Although respondents believe, as explained below, that the court's decision should be affirmed via application of a direct evidence standard, even if this Court decides that a different standard is appropriate, respondents are still entitled to qualified immunity because all the petitioner has unearthed to support his claim of unconstitutional motive, after nearly two dozen depositions, is "inference and weak circumstantial evidence, notably the timing of events." Pet. App. 17a.

I. THE APPLICATION OF AN OBJECTIVE QUALIFIED IMMUNITY TEST IN UNCONSTITUTIONAL MOTIVE CASES HAS IMPELLED THE CREATION OF A HEIGHTENED PLEADING STANDARD.

This case presents the question of how to apply the doctrine of qualified immunity to cases where plaintiffs sue government officials in their individual capacities and assert that the officials acted with an unconstitutional motive. The genesis of this legal dispute is the Court's decision in *Harlow* v. *Fitzgerald*, which fundamentally altered the method of determining whether an official is entitled to qualified immunity.

1. The doctrine of qualified immunity reconciles two important but countervailing interests: (i) providing a

[11] Although the standard commonly referred to as a "heightened pleading" standard, that is a misnomer. As the court of appeals noted, "heightened production" is probably the better characterization in the summary judgment context. Pet. App. 9a, n.8.

damages remedy to vindicate constitutional guarantees; and (ii) minimizing the heavy social costs imposed by litigation against public officials in their individual capacities. *Harlow* v. *Fitzgerald*, 457 U.S. at 814 (citing *Butz* v. *Economou*, 438 U.S. at 506 and *Bivens*, 403 U.S. at 410). Qualified immunity "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 112 S.Ct. 1827, 1833 (1992).

This Court has recognized that *Bivens* suits "frequently run against the innocent," and impose a heavy cost "not only to the defendant officials but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814. There is also "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id.*, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Thus, it is vital to protect officials from such claims with a vigorous application of qualified immunity "at the earliest possible stage in litigation." *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991); *Siegert* v. *Gilley*, 500 U.S. 226, 231-32 (1991).[12]

The "essence" of qualified immunity is "its possessor's entitlement not to have to . . . stand trial or face the other burdens of litigation," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817; *Anderson* v. *Creighton*, 483 U.S. 635, 646, n.6 (1987). Because qualified immunity is "an *immunity from suit* rather than a mere

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[12] The same rationale applies to suits brought pursuant to 42 U.S.C. § 1983. *Butz* v. *Economou*, 438 U.S. at 499-503.

defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell* v. *Forsyth*, 472 U.S. at 526 (emphasis added); *Siegert* v. *Gilley*, 500 U.S. at 232.

In the years immediately following *Bivens*, an official's entitlement to qualified immunity was evaluated by application of a two-part test composed of objective and subjective factors. *Scheuer* v. *Rhodes*, 416 U.S. 232, 247-48 (1974); *Wood* v. *Strickland*, 420 U.S. 308, 321-22 (1975). In *Harlow* v. *Fitzgerald*, however, this Court "completely reformulated qualified immunity along principles not at all embodied in the common law," *Anderson* v. *Creighton*, 483 U.S. at 645, and applied an objective test to evaluate claims of entitlement to qualified immunity. The Court jettisoned the subjective, good faith element of qualified immunity because evaluation of that subjective issue "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16. Thus, after *Harlow*, government officials are entitled to qualified immunity so long as their conduct is "objectively reasonable" and does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818.

Two years after *Harlow*, the Court, in *Davis* v. *Scherer*, 468 U.S. 183 (1984), considered again the objective reasonableness standard of qualified immunity. The Court reiterated the holding in *Harlow*, noting that it had "rejected the inquiry into state of mind in favor of a wholly objective standard" and that "[w]hether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' *No other 'circumstances' are relevant to the issue of qualified immunity.*" 468 U.S. at 191, (emphasis added) (citation omitted). Subsequent decisions have similarly reaffirmed *Harlow*'s objective standard. *See Mitchell* v. *Forsyth*, 472

U.S. at 517 (*Harlow* "purged qualified immunity doctrine of its subjective components"); *Anderson* v. *Creighton*, 483 U.S. at 641 (whether a warrantless search "was objectively legally unreasonable . . . will often require examination of the information possessed by the searching officials [but] this does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize"). *See also Halperin* v. *Kissinger*, 807 F.2d 180, 186 (D.C. Cir. 1986) ("objectification" of qualified immunity under *Harlow* "not even *nearly* achieved" unless *Harlow* is read to preclude motive-based *Bivens* claims.) (Scalia, J.) (emphasis in original).

2. Under *Harlow*'s objective standard, an official is presumed to act in good faith and that presumption is irrebuttable, so long as his or her objective conduct violates no clearly established right. Thus, *Harlow* and its progeny could—and perhaps should—be read to bar a plaintiff from even bringing a *Bivens* suit that turns solely on a public official's allegedly unconstitutional motive. *Halperin* v. *Kissinger*, 807 F.2d at 184-87; *Smith* v. *Nixon*, 807 F.2d 197, 201 (D.C. Cir. 1986) (allegedly improper "subjective intent" is "irrelevant").

The lower courts generally have thought that result too harsh and have declined to read *Harlow*'s language so broadly "without more specific indication that that was intended." *Halperin*, 807 F.2d at 186; *Martin* v. *D.C. Metropolitan Police Department*, 812 F.2d 1425, 1432 (D.C. Cir. 1986) ("We do not think . . . the *Harlow* decisional line reaches that far.") (R. Ginsburg, J.); *Kenyatta* v. *Moore*, 744 F.2d 1179, 1185 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985).[13] Yet, as

[13] The Eleventh Circuit recently noted, however, that "[f]or qualified immunity purposes, the subjective motivation of the defendant-official is irrelevant." Thus, "*Harlow's* objective standard would be rendered meaningless if a plaintiff could overcome a sum-

the court of appeals observed in *Martin*, reading *Harlow* less expansively where unconstitutional motive is alleged, creates a problem because motive necessarily encompasses a subjective component:

> The 'clearly established law' and 'objective reasonableness' facets of current qualified immunity doctrine tug in opposite directions where, as here, the 'clearly established law' itself contains a subjective component.

812 F.2d at 1432. Citing *Harlow*'s expressed need to balance a "prompt termination of vexatious litigation against public officials" with "the countervailing need to provide a 'realistic avenue for vindication of constitutional guarantees,' " the court concluded:

> Where the defendant's subjective intent is an essential component of plaintiff's claim, once defendant has moved for pretrial judgment based on a showing of the objective reasonableness of his actions, then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive. *That is some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial.*

812 F.2d at 1435 (emphasis supplied).[14] *Accord Whitacre* v. *Davey*, 890 F.2d 1168, 1171 (D.C. Cir. 1989),

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mary judgment motion based on qualified immunity by injecting the defendant's state of mind into the pleadings." *Hansen* v. *Soldenwagner*, 19 F.3d 573, 578 (11th Cir. 1994).

[14] In fashioning this test, the court contemplated "some space for discovery" in applying the standard: "Allowing plaintiffs to raise certain claims of unconstitutional motive would become an empty gesture were we to impose a blanket restriction on *all* discovery prior to the resolution of the qualified immunity issue on summary judgment." 812 F.2d at 1437 (emphasis in original). As the direct evidence standard has been reiterated, the court of appeals generally has backed away from permitting discovery on

cert. denied, 497 U.S. 1038 (1990); *Siegert* v. *Gilley*, 895 F.2d at 801-02.[15]

The court explained that because motive encompasses a subjective component, a *Bivens* plaintiff alleging unlawful motive could simply "allege facts consistent with lawful conduct and append a claim of unconstitutional motive, thus imposing on officials the very costs and burdens of discovery that *Harlow* intended to spare them." *Siegert*, 895 F.2d at 801; *Hobson* v. *Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). Thus, faced with the dilemma of how to deal with motive in assessing qualified immunity, the court of appeals properly concluded that *Harlow* "impels the application of a standard more demanding of plaintiffs." *Martin*, 812 F.2d at 1435.[16]

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motive-based issues in the qualified immunity context. *Siegert* v. *Gilley*, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 500 U.S. 226 (1991). Of course, in this case, petitioner was permitted to conduct very extensive discovery.

[15] Recently, in *Kartseva* v. *Dep't. of State*, 37 F.3d 1524, 1531 (D.C. Cir. 1994), the court of appeals explained that it has a two-tiered heightened pleading standard. Direct evidence is required only when the outcome of a case "depends on the defendant's state of mind." Where the outcome does not turn on motive, heightened factual detail is all that is required to assess entitlement to qualified immunity.

[16] As Judge Henderson noted, while no other circuit court has adopted the direct/circumstantial test employed by the District of Columbia Circuit, most courts of appeals adopted some form of heightened pleading standard in response to *Harlow*. Pet. App. 9a-11a & n.10 (citing cases). *See Elliott* v. *Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991) (seeks to resolve the "conundrum" created by *Harlow* by requiring plaintiff to produce "specific nonconclusory factual allegations which establish [the necessary mental state], or face dismissal."); *Pueblo Neighborhood Health Ctrs., Inc.* v. *Losavio*, 847 F.2d 642, 649-50 (10th Cir. 1988) (Court agrees that *Harlow* "impels" application of heightened pleading standard where qualified immunity asserted).

II. THE DIRECT EVIDENCE STANDARD IS IMPELLED BY THE COURT'S DECISION IN *HARLOW*.

1. The array of options for resolving motive-based *Bivens* claims spans the spectrum "from officials' full exposure to conventional discovery, to withdrawal of *Bivens* liability for constitutional torts involving subjective intent." Pet. App. 66a (Williams, J. concurring). The height at which the bar is set depends upon "the trade-off between the benefits of assuring citizens compensation for unconstitutional acts and the costs of exposing officials to many suits that, though ultimately meritless, can only be proven meritless after great expense in time, stress and money." *Id.* *Harlow* mandates that the bar be set quite high.

Ths Court admonished in *Harlow* that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18. The Court further held that government officials should only be subjected to those costs and burdens on the basis of a wholly objective standard. *Id.* The creation of the heightened pleading standard with its direct evidence component for motive-based *Bivens* claims is impelled by the concern that the application of a lesser pleading standard would effectively reimpose "precisely the burden *Harlow* sought to prevent." *Hobson* v. *Wilson*, 737 F.2d at 29.

The direct evidence test falls close to that end of the spectrum that does not permit inquiry into subjective motive. But that is understandable given: (1) the expansive language of *Harlow* and its progeny emphasizing objectivity in assessing entitlement to qualified immunity; (2) the Court's directive to determine entitlement to qualified immunity at the earliest possible stage of litigation; and (3) the need to prevent officials from being distracted and burdened by insubstantial suits.

Importantly, the rule is not a standard based upon any perceived difference in the quality of direct versus circumstantial evidence. Rather, the policy reasons for qualified immunity, which this Court has repeatedly emphasized, explain the imposition of a direct evidence restriction in the *Bivens* context. In short, the use of the direct evidence formulation serves to protect officials from suit while permitting meritorious claims to go forward.

As the court of appeals explained in *Martin*, it is not "extraordinary" to limit the type of evidence that can be considered, or the inferences that can be drawn from evidence, based upon substantive policy concerns. 812 F.2d at 1435-36. Antitrust, conspiracy and fraud cases all require something beyond bare allegations to survive summary judgment. *Id.*, citing, *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (where antitrust conspiracy alleged, "mistaken inferences . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect."); *Compare First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968) (circumstantial evidence of conspiracy insufficient to take the case to the jury where inference of nonconspiratorial conduct equally plausible).

Other examples of such evidentiary limitations abound. For example, traditionally under both the common law and federal law, the need to protect witnesses from being deterred from providing honest testimony has justified very strict evidentiary standards for proving perjury, generally requiring "direct" evidence and two witnesses. *See Weiler* v. *United States*, 323 U.S. 606 (1945); 60A Am. Jur. 2d *Perjury* §§ 96-97. Indeed, the "two witness" rule furnishes a useful analogy. Like the rule of qualified immunity, which is based on claims to special procedural protection arising out of public policy concerns articulated in *Harlow*, the "two witness" rule is based upon

the perceived need "to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions," *Weiler*, 323 U.S. at 609, not upon some generally applicable rule of evidence.

Indeed, entire types of evidence are quite frequently excluded from consideration based upon policy grounds wholly apart from the credibility, strength or probative value of the evidence. *See e.g.* Fed. R. Evid. 407 (remedial measures), 408 (offers of compromise), 409 (payment of medical expenses); 1 *McCormick on Evidence*, (4th ed. 1992), 313-67 (attorney-client privilege), 292-312 (marital communications privilege), 368-92 (physician-patient privilege).

Thus, there are many areas in the law where different evidentiary limitations are applied to advance a particular public policy. Here the policy reasons undergirding the objective approach to qualified immunity justify the strict constraints imposed by he direct evidence rule when the question of motive is injected into the equation. The rule furthers the important public policy of protecting a government official's ability to exercise discretion without the constant threat of personal liability based upon what inferences about his or her state of mind might later be drawn by another, or about how a particular set of circumstances might be perceived by another. The import of this protection is great because the more delicate, important or controversial the policy decision, the greater the threat of personal liability based upon mistaken or partisan inferences. Thus, the standard permits government officials to act based on proper considerations, not based on whether their actions may be misconstrued by others and the threat of personal liability.

Although requiring direct evidence severely constrains motive-based *Bivens* cases, it does not foreclose them altogether. Direct evidence that a government official acted with an unconstitutional purpose is not, as peti-

tioner suggests, impossible to obtain. *See, e.g., Davis* v. *Passman*, 442 U.S. 228 (1979) (direct evidence in the form of a letter from defendant). Rather, the direct evidence standard represents the circuit court's judgment as to the appropriate balance between the competing and conflicting concerns identified in *Harlow*. Although the rule may screen out an occasional meritorious case, far more often it gives meaningful substance to the important public policy that qualified immunity is an immunity from suit.

Importantly, the direct evidence standard has the added benefit of being an easily applied and easily understood bright-line formulation. This Court has long recognized that bright-line standards are "important and necessary in many areas of the law, including constitutional law." *Arkansas Electric Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 392 (1983) (applying bright-line test in a regulatory context); *Quill Corporation* v. *North Dakota*, 112 S. Ct. 1904 (1992) (applying bright-line test in sales and use tax context). Such bright-line rules encourage settled expectations and discourage protracted and meritless litigation. *Bowsher* v. *Merck & Co., Inc.*, 460 U.S. 824, 842, n.18 (1983). Like other bright-line tests, direct evidence sometimes "appears artificial at its edges," *Quill Corp.*, 112 S. Ct. at 1914, but, on balance, it vindicates legitimate and very important public purposes which far outweigh any perceived unfairness at the margins.

2. The criticism levelled at the direct evidence rule by petitioner and the Solicitor General is unwarranted because, as noted by Judge Silberman below, it "focuses on the trees rather than the forest." Pet. App. 67a. Petitioner and amici argue that the rule should be repudiated because it rejects "even strong claims in the salutary effort to eliminate unfounded ones." SG Br. 19; Pet. Br. 24. But they fail to acknowledge that the natural consequence of their approach will be that all man-

ner of insubstantial claims will survive, through burdensome discovery and into trial—and qualified immunity will thereby be lost—in order to preserve the occasional meritorious claim. *Harlow* does not contemplate that result. Indeed, the Court has recognized that qualified immunity is designed to protect officials who err because "it is better to risk some error and possible injury from such error than not to decide or act at all." *Scheuer* v. *Rhodes*, 416 U.S. at 242; *Davis* v. *Scherer*, 468 U.S. at 196.

There also is no merit to the contention that the direct evidence standard conflicts with this Court's precedents. To be sure, this Court has recognized in other settings that "[c]ircumstantial evidence . . . is intrinsically no different from testimonial evidence." *Holland* v. *United States*, 348 U.S. 121, 140 (1954). The Court, however, was not addressing the issue presented here—the need to require a litigant to adduce a certain type of evidence in order to satisfy extrinsic policy considerations such as immunity.

Nor is it persuasive that because circumstantial evidence is permitted in criminal cases to meet the beyond a reasonable doubt standard, it is appropriate to permit such evidence in this context. Unquestionably, circumstantial evidence can be probative of a defendant's state of mind, and it is commonly utilized in both civil and criminal cases for that purpose. Therefore, if the objective were simply to maximize the opportunity for meritorious motive-based *Bivens* claims to be prosecuted successfully, then circumstantial evidence should be considered. In *Bivens* cases, however, there is the countervailing and greater objective of preserving qualified immunity for public officials.

The strong policy rationales for a prompt and objective resolution of the immunity issue, as articulated in *Harlow*, simply outweigh the competing concerns of plaintiffs seeking to pursue improper-motive claims against in-

dividual officials. Although this approach may occasionally result in the dismissal of a meritorious case, "that, alas, is exactly what immunity means: that the ability to obtain monetary damages for a wrong must sometimes yield to the need to protect public officials (and ultimately the public itself)." *Smith* v. *Nixon*, 807 F.2d at 203 (Scalia, J.); *Scheuer* v. *Rhodes*, 416 U.S. at 242.

In any event, petitioner's and amici's complaint about the purported unfairness of having to prove unconstitutional motive by direct evidence and without discovery is of no consequence in this case. After five years of litigation and protracted discovery, including twenty-three depositions, petitioner has completely failed to demonstrate an unconstitutional motive by respondents.

III. IF THE COURT REJECTS THE DIRECT EVIDENCE STANDARD, IT SHOULD NEVERTHELESS APPLY A MEANINGFUL HEIGHTENED STANDARD THAT REALISTICALLY PRESERVES QUALIFIED IMMUNITY IN MOTIVE-BASED *BIVENS* SUITS

If the Court chooses to reject direct evidence as the standard applicable to motive-based *Bivens* claims, it nevertheless should require some meaningful form of a heightened pleading requirement in order to effectuate the rationale of *Harlow*. The Court should not, however, adopt the approaches proposed by petitioner or amici, including the Solicitor General, which range from no heightened pleading standard at all, to a formulation that sets the bar so low as to be, in effect, no heightened pleading standard.

1. Initially, petitioner, relying on this Court's recent decision in *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), argues that the Federal Rules of Civil Procedure provide no basis for any heightened pleading standard. That is

incorrect. In *Leatherman*, this Court held that heightened pleading of claims against municipalities under 42 U.S.C. § 1983 is not required. The Court, however, expressly declined to rule on the issue of heightened pleading in qualified immunity cases. 113 S. Ct. at 1162. Emphasizing that the case before it involved a municipal defendant not entitled to immunity, the Court stated that "[w]e thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government defendants." *Id.*

Apart from the obvious—that *Leatherman* specifically refrained from addressing the issue presented in this case —that decision provides no basis for a conclusion that the Federal Rules of Civil Procedure foreclose heightened pleading standards in the *Bivens* context. Indeed, requiring heightened specificity in *Bivens* cases is consistent not only with the emphasis in *Anderson* v. *Creighton* on the "particularized" manner in which the immunity inquiry is to be undertaken, 483 U.S. at 640, but also with a "firm application" of Rule 8's mandate that a plaintiff demonstrate his or her entitlement to the relief sought. *Leatherman* did not alter those principles.

Moreover, qualified immunity is an affirmative defense, and thus, generally arises only when the defendant asserts it in a Rule 12 motion to dismiss or in a Rule 56 motion for summary judgment. When such a motion is filed, the defendant's substantive right to qualified immunity makes it incumbent upon the plaintiff, at a minimum, to respond with specific, concrete facts supporting the plaintiff's general averment of malice or improper motive. *See* Fed. R. Civ. P. 56(e) (requiring through affidavits and other evidence "specific facts showing there is no genuine issue for trial"). To conclude otherwise would abrogate the substantive immunity possessed by public officials that is intended to free them from the burdens of litigation.

Because qualified immunity is a substantive right, it trumps any federal procedural rule pursuant to the Rules Enabling Act, 28 U.S.C. § 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"). Thus, "[t]o the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity." *Schultea* v. *Wood*, 1995 WL 98234, *10 (5th Cir. March 9, 1995) (en banc) (Jones, J., concurring). *But see Elliott* v. *Thomas*, 937 F.2d at 345. Accordingly, there is no merit to the assertion that *Leatherman* or the Federal Rules foreclose heightened pleading requirements in the qualified immunity arena.[17]

2. While petitioner and amici argue that no heightened pleading standard is appropriate, the Solicitor General proposes a standard whereby a plaintiff must respond to a claim to qualified immunity "with a *factually specific* statement of the claim that a clear right has been violated." SG Br. 20. (emphasis in original). The Solicitor General, in seeking to avoid Scylla, has steered into Charybdis. With respect, the standard the Solicitor General proposes is no standard at all. It provides no real protection for the official sued in a *Bivens* action because it is no burden for a plaintiff to compose a factually specific statement identifying the violation of a clear right. The application of such an approach, when improper motive is an element of the underlying claim, is sure to

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[17] The courts of appeals have responded in a myriad of ways to *Leatherman*. For example, some have continued to adhere to a heightened pleading standard in improper motive *Bivens* cases. *Branch* v. *Tunnell*, 14 F.3d 449, 456-57 (9th Cir.), *cert. denied*, 114 S.Ct. 2704 (1994); *Kartseva* v. *Dep't of State*, 37 F.3d at 1531. By contrast, the Seventh Circuit has concluded *Leatherman* precludes any heightened pleading standard, *Black* v. *Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994). Most recently, the Fifth Circuit has adopted an entirely different and unique approach that relies on a use of Fed. R. Civ. P. 7. *Schultea* v. *Wood*, 1995 WL 98234.

lead to the very burdens qualified immunity is intended to foreclose.[18]

Moreover, the proposed standard is meaningless because it fails to address the *quality* of the evidence relied upon by the plaintiff making his or her factually specific claim, or to focus on the evidence of malice or improper motive. As such, it is clearly distinguishable from, and far less protective of public officials than, for example, the standard discussed by Justice Kennedy in *Siegert*, and later in *Wyatt*, whereby a plaintiff would be required to "put forward specific, nonconclusory factual allegations *which establish malice*, or face dismissal." *Siegert* v. *Gilley*, 500 U.S. at 236 (Kennedy, J., concurring) (emphasis added); *Wyatt* v. *Cole*, 112 S.Ct. at 1835-37 (Kennedy and Scalia, JJ., concurring). Justice Kennedy's formulation clearly links a plaintiff's requisite factual specificity to the actual establishment of malice. By contrast, the Solicitor General's proposal merely requires factual specificity coupled with an averment that a clear right has been violated. As such, it affords no protection for the unlucky official accused of acting with an unlawful purpose.

The Solicitor General's suggested approach also represents a retreat from the test the Solicitor General previously advocated in *Siegert*—that in improper motive cases a court must dismiss on the pleadings unless the plaintiff alleges "specific and concrete facts that raise a genuine issue as to the objective reasonableness" of the defendant's conduct. C.A. App. 138, n.13. That articulation, as well, had the benefit of forcing an early evaluation of whether the "specifically alleged facts" raised a "genuine issue"

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[18] The standard proposed by the Solicitor General may well be appropriate in non-motive based *Bivens* cases. The proposal makes no distinction, however, between motive and non-motive based claims. SG Br. 23-24, n.24.

as to whether an official's conduct was objectively reasonable. Accordingly, the respondents urge the Court to reject in *Bivens* cases where improper motive is at issue, the proposals advanced here by the Solicitor General.

3. Respondents submit there is another alternative that is far preferable to the Solicitor General's proposal, and worthy of consideration—a "clear and convincing evidence" standard. A bedrock principle of qualified immunity jurisprudence is the concept that an official is entitled to immunity so long as he or she acts in an "objectively reasonable" manner. *Malley* v. *Briggs,* 475 U.S. 335, 341 (1986). Thus, if qualified immunity means anything, it should not be denied to an official when a plaintiff, as here, advances only weak inferences of improper motive.

That concern can be allayed with the application of a clear and convincing evidence standard. Under that approach, a plaintiff alleging improper motive, upon receiving a motion to dismiss or for summary judgment asserting qualified immunity, would be required to support a claim with clear and convincing evidence that demonstrates unlawful motive. Application of this standard would permit a plaintiff to rely on all available evidence in support of his or her claim, without thereby subjecting the defendant official to the burdens of litigation any time that a plaintiff can cobble together, weak facts and circumstances that *might* persuade a jury by a preponderance of the evidence that the defendant acted with an unlawful motive.

The clear and convincing evidence standard, as applied here, would thus work much as it does in the libel setting. An evaluation of summary judgment in an immunity context would, as in the libel setting, require a court to "view the evidence submitted through the prism of the substantive evidentiary burden." *Anderson* v. *Liberty Lobby,* 477 U.S. 242, 254 (1986). Therefore, unless a

plaintiff could respond to an official's claim to qualified immunity with evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence," the defendant official should be accorded immunity. *Id.*

The application of a "clear and convincing" standard is supported by the venerable principle that government officials are presumed to act in good faith absent proof to the contrary. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (the "presumption of regularity . . . supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their duties"). Thus, for example, when relief is sought directly from the government based upon an alleged bias or impermissible motive on the part of the government official, the lower courts have erected a high barrier to shield the government from unsubstantiated bias claims. Because there is a strong presumption that government officials act in good faith, the courts have held in those contexts that a plaintiff alleging bad faith must come forward with "well-nigh irrefragable proof to overcome the presumption of good faith." *Torncello* v. *United States*, 681 F.2d 756, 770 (Ct. Cl. 1982); *Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993).

Clear and convincing evidence is a well-known standard with a long pedigree in the law. It is easily understood and has been employed by the courts in a variety of contexts where public policy justifies requiring a plaintiff to support his claims with strong evidence. *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261, 282 (1990). For example, recognizing that fraud is simple to allege and is ordinarily a question for a jury, the courts commonly require clear and convincing evidence of fraud to support a tort action. *Woodby* v. *INS*, 385 U.S. 276, 285, n.18 (1966). Clear and convincing evidence of improper motive is also required in libel cases

involving public figures, *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991), as well as to prove oral contracts, and in deportation, denaturalization and civil commitment proceedings. *See Cruzan,* 497 U.S. at 282 (citing cases).

As explained in *Cruzan,* this Court has mandated clear and convincing evidence as a standard of proof where the interests at stake are important and involve more than a mere loss of money. 497 U.S. at 282; *Grogan* v. *Garner,* 498 U.S. 279 (1991). The purpose of qualified immunity and the particular dangers of permitting an inquiry into an official's motive,[19] constitute "particularly important" interests that justify the application of a clear and convincing evidence standard where improper motive is alleged in the *Bivens* context.

Respondents submit, therefore, that if the Court rejects the direct evidence standard, it should apply as an alternative, a clear and convincing evidence standard. That standard constitutes a fair, alternative approach that would permit a plaintiff with *strong* evidence of improper motive to proceed, while at the same time allowing government officials to exercise their discretionary functions without fear that their actions will be second-guessed with a money damages lawsuit. Any lesser protection will impose "on officials the very costs and burdens . . . that *Harlow* intended to spare them." *Siegert,* 895 F.2d at 801.

IV. REGARDLESS OF WHICH APPROACH THE COURT ADOPTS, RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY.

Whatever standard the Court ultimately adopts to resolve the competing interests at play in a *Bivens* suit al-

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[19] *See United States* v. *Morgan,* 313 U.S. 409, 422 (1941) (Frankfurter, J.) (recognizing that probing the mental processes of the Secretary of Agriculture would be "destructive" to the integrity of the administrative process).

leging improper motive, the respondents are entitled to qualified immunity in this case. As the Court observed in *Harlow*, "[f]or executive officers in general, . . . qualified immunity represents the norm." 457 U.S. at 807. Thus, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. at 341. Importantly for this case, "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." *Id.*

Here, despite petitioner's arguments to the contrary, there can be no doubt that the respondents acted at all times in an objectively reasonable manner. There is *no evidence* that respondents acted with an unlawful intent, let alone evidence sufficient to rebut the strong presumption that respondents acted with a lawful intent. There is similarly no evidence that respondents violated any "clearly established law." Federal prisoners possess no constitutional right to be housed in the general prison population in which they are confined. *Hewitt* v. *Helms*, 459 U.S. 460 (1983). Inmates similarly possess no right to contact the media on terms chosen by themselves. *Pell* v. *Procunier*, 417 U.S. at 834; *Saxbe* v. *Washington Post Co.*, 417 U.S. at 849-50.

The district court cited as "evidence" of improper motive Quinlan's cancellation of the November 4 press conference. Yet Quinlan's actions were objectively reasonable and consistent with both his lawful explanation and the wide-ranging deference he as the Bureau Director is to be accorded. *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1976). Bureau regulations permit press contacts and press pools in some circumstances but they plainly do not permit press conferences. Quinlan did not cancel the press conference because of petitioner's message, but rather because he did not want to set a bad precedent for other inmates and because of the potential for dis-

ciplinary problems—a phenomenon this Court has recognized in the prison setting. *Pell* v. *Procunier*, 417 U.S. at 831-32. The fact that NBC News would not have been able to interview peittioner prior to the November 8 election, but for Quinlan's intervention, completely undermines the contention that the press conference cancellation was based on an improper motive.

Similarly, Quinlan's actions resulting in petitioner being placed in administrative detention on November 4, for what turned out to be twenty hours, can only be viewed as objectively reasonable. Whether or not Nina Totenberg actually told Miller that evening that petitioner's life was in danger, she admittedly did tell Miller that petitioner believed he was in danger from the government. C.A. App. 80, 169. By the time that information was filtered through Miller and at least one other person, it was reported to Quinlan that there was concern for petitioner's safety. Quinlan's reaction—having petitioner temporarily placed in administrative detention so that the threat could be assessed—was not only objectively reasonable, it was affirmatively mandated. Had Quinlan not acted to protect petitioner and assess the threat, and had petitioner suffered harm, doubtless he would now be complaining that Quinlan's failure to act was politically motivated. Moreover, petitioner had access to, and utilized, the telephone during his nonpunitive detention.

The allegations regarding Miller are similarly baseless. It can hardly be thought unusual or deemed suspect that Miller, as the Director of the Department of Justice's Office of Public Affairs, was in contact with the Bush/Quayle campaign press officer regarding petitioner's allegations about Quayle. This hardly supports a conclusion that Miller thereby was part of some broad fictional conspiracy to suppress petitioner's speech. Indeed, petitioner has advanced nothing but baseless speculation tying

Miller to any alleged unlawful activity regarding the November 4 detention.[20]

Finally, there is no evidence demonstrating any involvement by Quinlan or Miller in the subsequent November 7 and December 22 detentions. Indeed, there is not a scintilla of evidence that Quinlan and Miller ever spoke to each other during the events at issue. Accordingly, it follows that they are entitled to qualified immunity and this action, insofar as it is against them in their individual capacities, should be dismissed.[21]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 1995

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[20] It should also be noted that Miller's statement to Mark Goodin regarding petitioner's "entitlement" to a press conference was inaccurate. As a government media contact he could not reasonably be expected to be accurate on every nuance of the Bureau's regulations.

[21] This is not a case like *Bivens* where "it is damages or nothing." *Bivens*, 403 U.S. at 410; *Harlow*, 457 U.S. at 814. The petitioner still has unresolved claims against the United States pending in district court.